United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7125

75-7125

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

P/S

ROBERT A. McAULIFFE
Plaintiff Appellee

V.

ADOLF G. CARLSON
Defendant Appellant

ON APPEAL FROM A DECISION OF THE
UNITED STATES DISTRICT COURT,
DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANT APPELLANT

Appellant:

CARL R. AJELLO
Attorney General
30 Trinity Street
Hartford, Connecticut

Maurice Myrun,
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut

Paige J. Everin,
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut

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ISSUE

The issue in this case is whether it was error for the District Court to award as damages to the plaintiff, a transferee from a correctional center to a state mental hospital, sums billed and collected from him by the defendant as reimbursement for the care furnished him, if the statutes under which those sums had been collected were determined to be unconstitutional by that court.

OPINION BELOW

The decision herein appealed from was rendered by Judge Jon O. Newman of the United States District Court for the District of Connecticut. The opinion is reproduced in the Joint Appendix at pages 37a through 47a.

STATEMENT OF THE CASE

This was an action for a declaratory judgment declaring unconstitutional Sections 17-318 and 4-68g of the Connecticut General Statutes, and requesting return of all property taken from the plaintiff pursuant to those statutes. Relevant portions of these statutes are:

> "Sec. 17-318. Payment of hospital expense of inmate transferred from correctional institution. When any person has been transferred from the Connecticut Correctional Institution, Somers, the Connecticut Correctional Institution, Niantic, or its maximum security division, or the Connecticut Correctional Institution, Cheshire, to a state hospital, such person's hospital expense prior to the termination of his sentence shall be charged to the state. When any person has been transferred from a community correctional center to a state hospital, such person's hospital expense prior to the termination of his sentence shall be paid out of the estate of such person..."

> "Sec. 4-68g. (Formerly Sec. 17-21). Conservators for mentally ill or mentally retarded persons supported by the state. Whenever any person having property or an interest in property is committed or admitted to a state institution for the mentally ill or mentally retarded or, subsequent to such commitment or admission, acquires property or an interest in property, and the property is personal property of any kind or nature, not

> in excess of five thousand dollars, or annual income not in excess of said amount, no guardian or conservator shall be appointed, and the commissioner of finance and control shall be the guardian or conservator of such person, without court proceedings, only for the purposes hereinafter specified. ...Said commissioner shall hold or use such property or funds for the support and benefit of such person in the same manner as a duly appointed conservator, and shall maintain records of such property or funds and the disposition thereof..."

Plaintiff has been convicted of violating Section 53-75 of the Connecticut General Statutes (breaking and entering) on August 26, 1971 and was sentenced to a term of 360 days in the Hartford Correctional Center. On September 21, 1971, the Commissioner of Corrections transferred plaintiff to the Security Treatment Center in Middletown, a mental health facility; plaintiff remained there for 218 days until April 26, 1972, during which period he was serving his sentence. On June 30, 1972, the Commissioner of Finance and Control, defendant herein, billed plaintiff $1,098.07 for his confinement at the Security Treatment Center pursuant to Section 17-318 of the Connecticut General Statutes as amended and collected this amount from social security disability benefits the defendant was holding as representative payee of the plaintiff.

Plaintiff placed $150.00 in his hospital account at Norwich Hospital while confined there in December of 1972. This money was taken by the Commissioner of Finance and Control, the defendant herein, as statutory conservator pursuant to Section 4-68g of the Connecticut General Statutes as amended.

By judgment entered May 30, 1974, 377 F.Supp. 896 (D.Conn.1974), both statutes were declared unconstitutional. No appeal was taken from that judgment.

Footnote 12 (reported as footnote 13) of the memorandum of decision made reference to plaintiff's request for return of his funds as follows:

> "Plaintiff has requested this Court to order the defendant to return with interest from the date of seizure the property taken from him pursuant to Connecticut General Statutes §§17-318 and 4-68g. No order appears necessary at present, since it is expected that, in light of this decision declaring the challenged statutes unconstitutional, defendant will agree to return to plaintiff the property taken from him. If this does not occur, plaintiff can apply for a supplemental judgment. At that time consideration can be given to whether defendant has available a defense of sovereign immunity, Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed 2d 662 (March 25, 1974), or whether such defense is

> inapplicable to what is essentially a claim for restitution."

Defendant refused to return the funds. Plaintiff thereupon moved for supplemental relief seeking a total sum of $1,248.07 and an award of attorneys' fees.

The court's ruling, entered January 16, 1975, and its supplemental judgment, entered January 17, 1975, ordered the defendant to pay the sum of $1,248.07, but denied plaintiff's motion for attorneys' fees. It is from the order to pay that the defendant now appeals.

ARGUMENT

I.

THE ELEVENTH AMENDMENT, AND DECISIONS THEREUNDER, PROSCRIBED ANY ORDER BY THE LOWER COURT DIRECTING DEFENDANT TO RETURN FUNDS TO THE PLAINTIFF.

The funds in dispute were, at one time, either due and owing to the plaintiff, or in his possession. The State had used them to pay for certain expenses incurred by the plaintiff, but, under procedures which the lower Court has determined to be unconstitutional. It is the position of the State that the plaintiff had no recourse to that Court for the recovery of the funds since any such action was barred by the sovereign immunity of the State as explicitly set forth in the Eleventh Amendment and decisions of the U. S. Supreme Court.

In Ford Motor Company v. Department of Treasury, 323 U.S. 459 (1945), the petitioners brought suit against the department of treasury of the State of Indiana, and various officials, seeking a refund of gross income taxes paid to the department.

The Supreme Court decided not to pass upon the merits of the case, concluding that the petitioner's action could not be maintained in a federal court for want of consent by the State to that suit. It was of no concern to the Supreme Court, within the scope of that case, that the State statute might have been unconstitutional, that payments thereunder might never have been due the State, and that the funds exacted from the petitioner might never have accrued to its benefit.

Consider how much more far reaching that decision was than the one involving McAuliffe. There, the funds of the petitioner passed into the State treasury with no inkling of benefit to the petitioner, albeit the statute might have been of no constitutional validity. Here, the State provided care for McAuliffe using his funds toward partial reimbursement of the expenses involved. Here the State did provide services to the petitioner. If the Supreme Court saw fit not to restore funds to a petitioner who received no benefit from the State, then surely even less reason obtains for the interposition of the federal courts in restoring funds to one who has benefited by activities of the State.

Edelman v. Jordan, supra, denied a retroactive monetary award to an applicant for Aid to the Aged, Blind, and Disabled (AABD) on the basis of the Eleventh Amendment and various Supreme Court cases concerned with that amendment. Referring to Ford Motor Company it stated its position as to "equitable restitution":

> "The taxpayer claimed that the tax had been imposed in violation of the United States Constitution. The term 'equitable restitution' would seem even more applicable to the relief sought in that case, since the taxpayer had at one time had the money, and paid it over to the State pursuant to an allegedly unconstitutional tax exaction. Yet this Court had no hesitation in holding that the taxpayer's action was a suit against the State, and barred by the Eleventh Amendment. We reach a similar conclusion with respect to the retroactive portion of the relief awarded by the District Court in this case." 39 L.Ed 2d 676.

II.

THE STATE OF CONNECTICUT DID NOT WAIVE ITS ELEVENTH AMENDMENT IMMUNITY.

The court below, after citing Edelman v. Jordan, rests its decision for the plaintiff on a finding that the State of Connecticut

consented to suits against the defendant when he acted pursuant to the authority of Connecticut General Statutes §§4-68c and 4-68g; even though the State did not expressly waive its immunity. The relevant portion of §4-68c follows:

> "Sec. 4-68c. Powers and duties of administrator. The estate administrator may act as guardian, conservator, administrator or trustee, or in any other fiduciary capacity under the jurisdiction and appointment of the probate courts of this state or like courts of any other state or of the United States, or any instrumentality of any other state or of the United States qualified to appoint fiduciaries, only in connection with property of any minor, incapable, incompetent or deceased person who is or has been receiving financial aid from the state. The estate administrator shall have the same rights and powers and be subject to the same duties and obligations as are possessed by and imposed upon guardians, conservators, administrators and other fiduciaries, and such courts or instrumentalities are authorized to appoint the estate administrator, trustee or other fiduciary in connection with property of any such minor, incapable, incompetent or deceased person...."

In this respect Edelman v. Jordan stated:

> "In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.'

Murray v. Wilson Distilling Co., 213 U.S. 151,171 (1909). We see no reason to retreat from the Court's statement in Great Northern Insurance Co. v. Read, 322 U.S. 47,54 (1945)(footnote omitted):

> '[W]hen we are dealing with sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.'" 39 L.Ed 2d 678,679.

The Court noted, in Edelman, that the cause of action, created by 42 U.S.C. §1983, was coupled with the enactment of the AABD program and the issuance by the Department of Health, Education and Welfare of regulations requiring the State to make corrective payments after successful fair hearings and providing federal matching funds to satisfy federal court orders of retroactive payments. Still, the Court held that this did not suffice to overcome the bar of the Eleventh Amendment. There was no waiver by the State.

Further, as to waiver, Rothstein v. Wyman, 467 F.2d 226,238 (2d Cir. 1972) held:

> "With respect to the matter of waiver, it is unquestionably true that a state may voluntarily relinquish the shield of the Eleventh Amendment, but, as is always the case in the area of alleged waivers of constitutional rights, that relinquishment must be shown to be clear and unequivocal. Great Northern Life Ins. Co. v. Read, 322 U.S. 47,54, 64 S.Ct. 873, 88 L.Ed. 2d 1121 (1944); Knight v. State of New York, 443 F.2d 415,419 (2d Cir. 1971).

There was no clear and unequivocal relinquishment of its constitutional rights by the State of Connecticut, and consequently it did not waive its Eleventh Amendment immunity.

III.

EVEN IF THE STATE OF CONNECTICUT DID CONSENT TO SUIT PLAINTIFF MAY NOT RECOVER HIS FUNDS.

Now let us assume, arguendo, that the State of Connecticut did waive its immunity to suit as psited by the District Court. At the time the State took hold of plaintiff's funds it did so in accordance with clear statutory sanction and for a legitimate purpose. As Judge Newman said in McAuliffe v. Carlson, 377 F.Supp. 896 at page 900:

> "Connecticut undoubtedly has a legitimate interest in relieving its taxpayers by requiring prisoners with earning potentials or assets to reimburse the State for the expense of maintaining them in state hospitals."

And further at page 905:

> "The State undoubtedly has a legitimate interest in obtaining reimbursement for state mental health care rendered to individuals with assets."

Here is a situation where the plaintiff claims that funds were exacted from him in an unconstitutional fashion and should be returned to him despite their use as reimbursement for services furnished him. The effect of a finding of unconstitutionality upon the rights and responsibilities of the parties was explored by Mr. Chief Justice Hughes in Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371,374, 60 S.Ct. 317, 84 L.Ed 329,332 (1940):

> "The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. Norton v. Shelby County, 118 U.S. 425,442, 30 L.Ed 178,186, 6 S.Ct. 1121; Chicago, I. & L.R.Co. v. Hackett, 228 U.S. 559,566, L.Ed 966,969, 33 S.Ct. 581. It is quite clear, however,

> that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination." (Cited in Gosa v. Mayden, 413 U.S. 665,675, 37 L.Ed 2d 873,885, 93 S.Ct. 2926 (1973).

The Connecticut statutes determined unconstitutional were effective until such finding. They were "an operative fact" describing the course to be followed by the defendant in the course of his official functions. Were he to have adopted any other course he might well have been charged with the dissipation of funds of the State of Connecticut.

Judge Newman stated that the defendant violated his fiduciary duties by consenting, for his ward, to payments not constitutionally required; yet, no authority was cited for that finding. There is no doubt that a fiduciary knowing of the invalidation of a statute

by reason of a court decision would be derelict in dispensing funds in line with that statute. However, to hold him to account for dispensing funds pursuant to a statute valid at the time would place every conservator, guardian, trustee, administrator and executor, in a patently untenable position. Not only would he be required to be knowledgeable in the law, but he would need a prescience rare even among its most gifted practitioners.

At page 8 of his decision Judge Newman stated:

> "Defendant's breach of duty also involves a second element. The funds were taken not only in payment of an obligation unconstitutionally imposed, but also for the benefit of the fiduciary and the fiduciary's employer. See Clement's Appeal from Probate, 49 Conn. 519 (1882); Holbrook v. Brooks, 33 Conn. 347 (1866)."

Clement's Appeal stands for the proposition that a testamentary trustee who appropriates part of the income of the trust to pay off an alleged old debt due to himself, which is in fact a debt which he could not enforce, may not be permitted to retain such income. Holbrook v. Brooks holds that a guardian, joint owner of real estate with his ward, must divide the proceeds of the sale of such property equally with his ward and not take a larger portion for himself.

It is difficult to see how either case militates against the action taken by the defendant who used the funds for services rendered to the plaintiff.

CONCLUSION

The Appellant respectfully requests that the judgment of the District Court be reversed with respect to the allowance of damages to the plaintiff..

Respectfully submitted,

Maurice Myrun
Paige J. Everin
Assistant Attorneys General
90 Brainard Road
Hartford, Connecticut 06114

CERTIFICATION

I hereby certify that two copies of the foregoing Brief were mailed to the following counsel of record on the 20th day of March, 1975:

Michael J. Churgin, Esquire
Stephen Wizner, Esquire
Dennis E. Curtis, Esquire
127 Wall Street
New Haven, Connecticut 06520

Maurice Myrun

Maurice Myrun
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut 06114